

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1991

THE MEAD CORPORATION,  
*Petitioner,*

v.

B.E. TILLEY, *et al.*,  
*Respondents.*

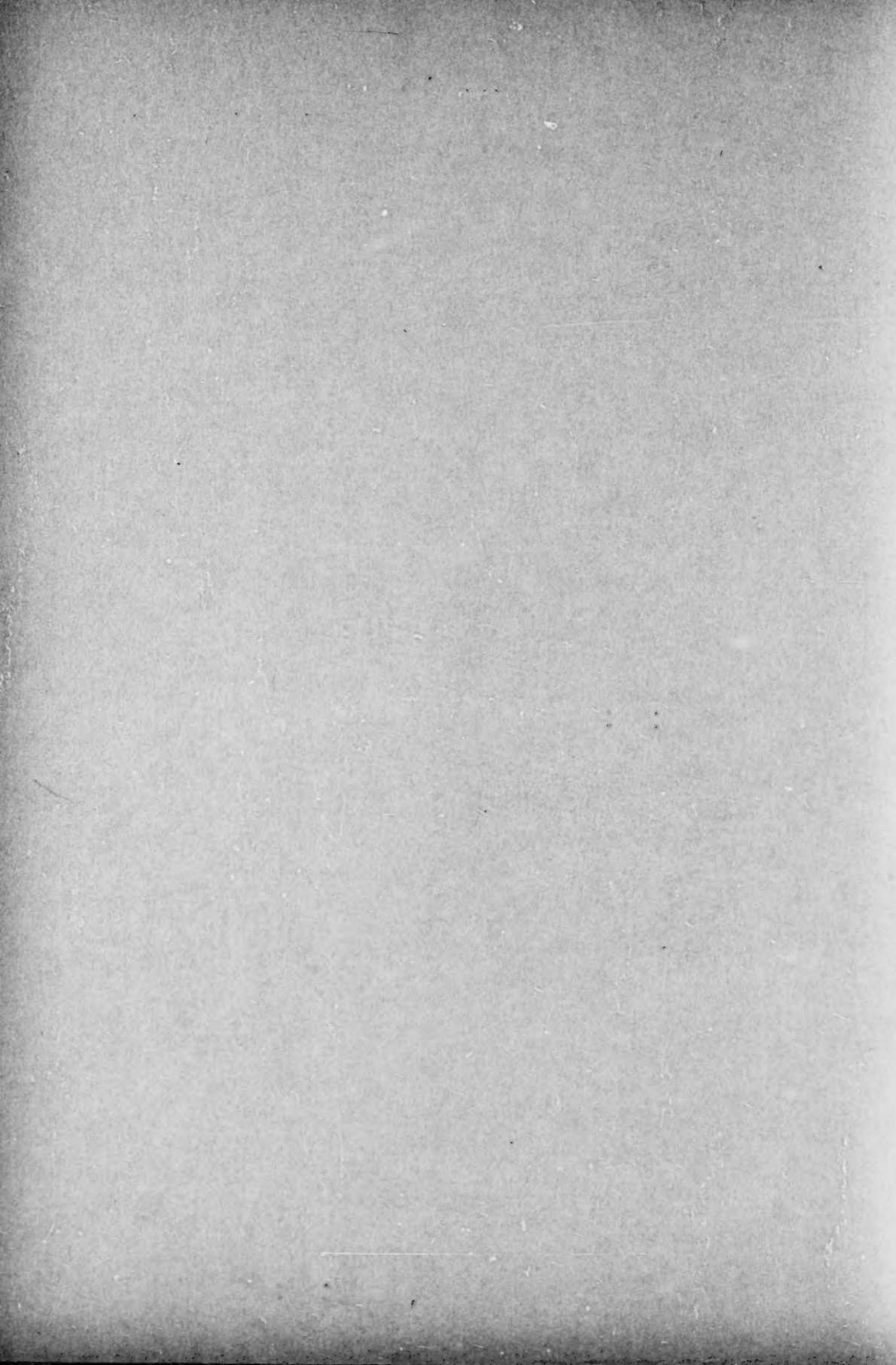
On Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the Fourth Circuit

**REPLY MEMORANDUM FOR PETITIONER**

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On Petition for a Writ of Certiorari to the  
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REPLY MEMORANDUM FOR PETITIONER

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ARGUMENT

In its petition for certiorari, The Mead Corporation ("Mead") demonstrated that the decision below creates a direct conflict over the proper construction of crucial pension law provisions of the Employee Retirement Income Security Act of 1974 ("ERISA") and the Internal Revenue Code ("Code") and that are incorporated into virtually every pension plan nationwide. In response to that showing, respondents informed the Court that the "technical" nature of the issues involved required them to "retain specialists in ERISA." See Application for Extension of Time to File Brief in Opposition to Petition for Writ of Certiorari at 1 (reprinted at App. 1a). Accordingly, respondents sought and received an extension of time to file their brief in opposition. In that opposition, respondents promise to demonstrate that this case is un-

worthy of certiorari. The opposition, however, misrepresents the law and the views of the responsible administrative agencies. Moreover, far from demonstrating that this case has only narrow significance, the bulk of the opposition is devoted to the counter-arguments of respondents' ERISA "specialists" on the merits of the important statutory construction issues presented by this case. These arguments serve only to highlight, in microcosm, the serious conflicts created by the decision below, which is at odds with the position of the responsible administrative agencies, other courts of appeals, and the pension community as a whole.

### **I. THE DECISION BELOW DOES NOT REST ON LANGUAGE PECULIAR TO THE MEAD PLAN**

Respondents claim that this case rests on the "peculiar text of the [Mead] plan . . . and thus does not warrant further review." Opp. 6. But respondents ultimately defeat their own attempt to characterize the decision below as avoiding the statutory issues that were remanded by this Court. Like the court below, respondents construe, as they must, the two relevant plan provisions—"contingent rights accrued" and "actuarial error"—by direct reference to ERISA and the Code.

Respondents initially attempt to demonstrate that the Mead Plan's reference to "contingent rights accrued" is unique by misleadingly contrasting the Plan only with Code § 401(a)(2)'s general reference to plan "liabilities." Opp. 6-7. This approach completely ignores the IRS regulations and revenue ruling that define and explain "liabilities" for purposes of § 401(a)(2). As the petition points out (Pet. 14-15), for almost forty years the IRS has specified that § 401(a)(2) liabilities include "contingent liabilities," which consist of "benefit credits accrued up to the time of termination." Rev. Rul. 53-33, pt. 3(d), 1953-1 C.B. 267, 274; *accord*, e.g., Rev. Rul. 69-421, pt. 3(d), 1969-2 C.B. 59, 69. Thus, the Mead Plan's reference to "contingent rights accrued"

is nothing more than an incorporation of the IRS' long-standing definition of "liabilities" in its regulations and revenue rulings.

Indeed, even respondents recognize that the Mead Plan cannot be read without reference to ERISA and the Code. Immediately after asserting that the Mead Plan's language is "unique" and is not derived from ERISA or the Code, respondents proceed to construe that language by reference to IRS regulations and revenue rulings. Specifically, respondents argue that the "lower Court's interpretation of a contingent right is . . . consistent with a still extant 1943 Treasury Regulation," and "in consonance with . . . a consistent line of IRS authority." Opp. 7-9 (citing Treas. Reg. § 1.401-2(b) (2); Rev. Rul. 53-33, pt. 3(d), 1953-1 C.B. 267, 274).

Respondents take a similar tack with the second pension law provision at issue—"actuarial error." Here, significantly, respondents do not even attempt to argue that the actuarial error provision is "peculiar" to the Mead Plan. *See* Opp. 10-12. Instead, as they did with the "contingent rights" provision, respondents proceed directly to argue that the construction adopted by the decision below is consistent with IRS regulations. Opp. 12 (quoting Rev. Rul. 83-52, 1983-1 C.B. 87).

Thus, with both issues, respondents ultimately do not demonstrate that the Plan language is anything other than a direct incorporation of provisions from ERISA and the Code. Instead, respondents simply argue for their interpretations of the relevant statutes, regulations, and revenue rulings. Those interpretive issues, of course, are the questions which the court below decided and which demand further review by this Court. Respondents' arguments, in short, serve only to belie their facile contention that the decision below rests solely on the language of the Mead Plan. As even the court below candidly recognized, the Plan language was "written in light of" IRS regulations and revenue rulings. App. 14a. Thus, respondents'

claim that this case rests on “peculiar” plan language simply collapses of its own weight—and, in all events, conflicts with the contrary understandings of the pension world held by the PBGC and the two professional associations of pension plan actuaries, all of which support Mead in this case. Indeed, a cynic might conclude that the court below purported to dress up its decision in the language of the pension plan precisely so that respondents could argue, as they have, that this case does not warrant this Court’s review, even though it plainly does.

## **II. THE DECISION BELOW CONFLICTS WITH THE VIEWS OF THE RESPONSIBLE ADMINISTRATIVE AGENCIES**

Respondents also claim (Opp. 12-16) that the decision below does not disregard the views of the IRS and the PBGC, but that position simply cannot be squared with the filings by both agencies in the court of appeals. The IRS submitted a letter to the court of appeals that confirmed “the position of the Internal Revenue Service” that the unearned early retirement benefits at issue here were not “liabilities” that had to be paid on plan termination. App. 167a-168a. The PBGC agreed, filing a brief stating unequivocally that “[u]nearned subsidized early retirement benefits are not among the liabilities . . . that must be paid before residual assets revert to the employer.” PBGC Br. on Remand at 4. The decision below reached precisely the opposite result. Thus, it is no surprise that the PBGC was moved to file a brief supporting rehearing en banc, in which it expressly criticized the panel majority for “failing even to consider” the agency views, and for adopting a “construction of terms of art used in the [Mead] Plan [that] does violence to the established meaning of those terms under the Code and ERISA.” PBGC Br. In Support of Rehearing at 5, 11 (reprinted at App. 185a, 189a).

### III. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS

Respondents attempt (Opp. 18-21) to dismiss the several conflicts in the circuits created by the decision below, but careful scrutiny reveals this attempt for what it is: a strained effort to elevate any possible difference in fact pattern into a legal distinction. Indeed, respondents' argument ultimately devolves into the remarkable suggestion that the dissent below was so strong that the Fourth Circuit itself likely will not adhere to the decision below in future cases. See Opp. 20-21.

With respect to the conflict on the meaning of "contingent liabilities," respondents first quibble with the status of the Third Circuit's decision in *Nobers v. Crucible Inc. 1975 Salaried Retirement Plan*, Nos. 90-3463, 90-3540 (3d Cir. Jan. 29, 1991) (reprinted at App. 161a-166a). But the unpublished nature of the opinion does not lessen the conflict. The *Nobers* Court, like the court below, was called upon to decide the precise meaning of the "contingent liabilities" provision incorporated in a pension plan. But unlike the court below, the Third Circuit in *Nobers* adopted the PBGC's view and held that unearned early retirement subsidies such as those at issue here were not "contingent liabilities." The conflict could hardly be more direct and it merits this Court's resolution.<sup>1</sup>

Respondents try to distinguish two other conflicting cases on "contingent liabilities," *May v. Houston Post Pension Plan*, 898 F.2d 1068 (5th Cir. 1990) (per curiam), and *Blessitt v. Retirement Fund for Employees of Dixie Engine Co.*, 848 F.2d 1164 (11th Cir. 1988) (en banc), by pointing out that neither involved early

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<sup>1</sup> This Court has treated all circuit conflicts as significant enough to potentially merit review, regardless of whether the conflicting decisions are published or not, and has frequently granted certiorari to review conflicts with unpublished decisions. See, e.g., *Doe v. United States*, 487 U.S. 201, 205-06 (1988); *Burlington N. R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 460 (1987).

retirement benefits. *See* Opp. 19-20 & n.18. This is true as a factual matter, but it provides no basis to ignore the legal holdings reached in these two decisions—holdings that directly conflict with the statutory analysis adopted below. The Fourth Circuit held in this case that “contingent liabilities” include any benefit that “the Plan was liable to pay . . . on a contingency—*i.e.*, the [respondents’] satisfaction of the age and service requirements.” App. 13a. This approach contradicts both the *May* and *Blessitt* holdings. *May*, for instance, did not deal with unearned early retirement subsidies per se but rather with the broader question of all “unaccrued and unearned benefits.” *See* 898 F.2d at 1070. The *May* court concluded that such unearned benefits—*i.e.*, “benefits that would accrue in the future if the employees continued to work for the employer”—were not “contingent liabilities” that had to be satisfied on plan termination prior to a reversion of surplus assets. *Id.* Thus, *May*’s broader holding plainly conflicts with the decision below, and that conflict is not eliminated simply because the Fifth Circuit’s reasoning is not limited to early retirement benefits. Similarly, the *Blessitt* court, dealing with any benefits that had not yet been earned under a pension plan, held that “unaccrued benefit expectancies” are not “contingent liabilities.” *See* 848 F.2d at 1170.

With respect to the conflict on the meaning of “actuarial error,” respondents’ attempt (App. 19a-21a) to disguise the conflict is even more untenable. First, respondents claim that the Eleventh Circuit’s decision in *Blessitt* to adopt the IRS definition of “actuarial error” is distinguishable because the plan in *Blessitt* more completely parroted the language of the relevant IRS regulation. *See* Opp. 19. Again, respondents have missed the point. *Blessitt* held that the plan’s reference to “actuarial error” should be construed to be consistent with the IRS definition of this term, while the decision below, as Judge Chapman pointed out in dissent, “deliberately ignor[ed]

the term's obvious origins in Treas. Reg. § 1.401-2(b)." App. 30a. The conflict could not be more direct.

Respondents also disingenuously attempt to enlist the *Blessitt* court itself in their effort to erase the conflict, suggesting that "the Eleventh Circuit *distinguished* this case." Opp. 19 (emphasis in original). But respondents neglect to mention that the Eleventh Circuit tried to distinguish the initial *Tilley* decision, not the decision now under review. Indeed, respondents fail to note that this Court has already rejected any attempt to distinguish *Blessitt*; in fact, this Court cited the conflict between *Blessitt* and the Fourth Circuit's initial decision in this case as the reason for granting certiorari. See App. 38a & n.8.

Respondents' attempt (Opp. 20) to distinguish the other conflicting court of appeals decision on "actuarial error"—*International Union, UAW v. Dyneer Corp.*, 747 F.2d 335 (6th Cir. 1984)—is similarly unavailing. Respondents do not, and cannot, dispute that this decision adopted the IRS definition of actuarial error, while the decision below "deliberately ignor[ed]" that definition. App. 30a; see also *Washington-Baltimore Newspaper Guild Local 35 v. Washington Star Co.*, 555 F. Supp. 257, 260 (D.D.C. 1983) (adopting IRS definition), *aff'd without opinion*, 729 F.2d 863 (D.C. Cir. 1984). Indeed, even respondents are not persuaded that they can distinguish the conflicting cases on actuarial error; they make the incredible argument that there is no conflict because the Fourth Circuit *itself*, in light of the "sharply divided" panel, will decline to adhere to the decision below in the future. See Opp. 20-21. Far from eliminating any conflict, respondents thus demonstrate the depth of the error in the decision below.

#### IV. THE DECISION BELOW CREATES WIDESPREAD UNCERTAINTY

Finally, respondents seek to downplay the significance of this case, claiming that it is "of interest only to the

parties.” Opp. 4, 21-23. Respondents overlook, however, the notable fact that, as discussed above, both of the agencies charged by Congress with administering ERISA participated in this case before the court of appeals. The PBGC participated not only in the briefing and oral argument before the panel on remand, but took the unusual step of filing an amicus brief in support of rehearing.<sup>2</sup> Moreover, as the PBGC pointed out in its brief below, it has significant reasons for supporting Mead’s position. The PBGC warned that a decision—like the one ultimately reached by the court of appeals—allowing respondents to recover unearned early retirement benefits:

would create significant uncertainty regarding the distribution of assets in thousands of closed and pending cases in which employers received or expected to receive reversions of residual assets . . . [and] would doubtless be relied upon by plan participants in other cases who might seek to reallocate

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<sup>2</sup> Respondents highlight the fact that the PBGC did not take the even rarer step of filing an amicus brief in support of Mead’s petition for certiorari, and draw the unwarranted inference that the PBGC no longer believes this case to be significant. *See* Opp. 22. The PBGC has filed five briefs in support of Mead in this case. Furthermore, its last brief called for rehearing en banc, thus making clear that the agency believes that this case meets the standards of Federal Rule of Appellate Procedure 35(a), which calls for en banc review only where necessary to “maintain uniformity” or in cases of “exceptional importance”—the same standards that obtain under Supreme Court Rule 10. There is absolutely no basis for respondents’ speculation that the PBGC’s position has changed; rather, the agency no doubt believed that its earlier filings adequately informed the Court and the parties of its position and interest, and that a further restatement of those views was unnecessary. If this Court has any doubt that the PBGC continues to believe that the decision below is both wrong and warrants further review, the appropriate step is to call for the views of the PBGC, which has independent litigating authority, prior to granting the petition.

billions of dollars previously distributed to participants and to employers.

PBGC Br. on Remand at 4. Thus, contrary to respondents' suggestion (Opp. 21), Mead has not "conjured up an imaginary parade of horrors" to buttress the significance of this case; Mead has simply repeated for the Court the analysis offered below by the PBGC.

Moreover, in claiming that this case has "interest only to the parties" (Opp. 4, 21-23), respondents conveniently ignore a pending class action suit that seeks the same benefits claimed by respondents for all other participants in the Mead Plan, whether they had one year of credited service, or seven years, or twenty-seven years. See *Linkous v. Mead Corp.*, No. 87-C165-R (W.D. Va. filed Apr. 24, 1987). This suit, which was filed by respondents' own counsel, presents in part the same issues presented here.<sup>3</sup>

Respondents also argue (Opp. 16-18) that the passage of the Retirement Equity Act of 1984, Pub. L. No. 98-397, 98 Stat. 1426 ("REA"), has "drained" all significance from the legal issues presented in the petition. Respondents are wrong. REA did not amend Code § 401(a)(2), which is the source of the legal issues presented in the petition; the "contingent liabilities" and "actuarial error" provisions at issue remain intact, and the erroneous constructions of those terms below remain problematic.<sup>4</sup> Indeed, far from REA draining this case of significance, it

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<sup>3</sup> Thus, it is disingenuous for respondents to argue, as they do repeatedly (Opp. 2 n.1, 12), that Mead will recoup the balance of the \$11 million surplus after respondents receive their benefits. As respondents' counsel well knows, some or all of that \$11 million may go not to Mead but to the *Linkous* class if the errors of the decision below are not corrected.

<sup>4</sup> For this reason, respondents' effort (Opp. 17) to point to a catalog of purportedly applicable state statutes of limitations is meaningless. Because the underlying provisions of ERISA and the Code have not been altered by REA or any other statute, their misconstruction by the court below will continue indefinitely to give rise to legal challenges to pension plan terminations.

is this case that threatens to drain REA of its importance. In REA, Congress required terminating pension plans to pay pension benefits to employees who, after termination, satisfy the plan's conditions for receiving those benefits by continuing service with the plan sponsor. See App. 27a-29a (Chapman, J., dissenting). The decision below, however, requires benefits to be paid to at least some participants who have not, and cannot, satisfy the age, service, or other conditions specified in the pension plan. App. 3a-4a, 12a; *see also* AAA/ASPA Br. at 16-17. Thus, at least in the Fourth Circuit, REA has been rendered a virtual nullity. Such a direct conflict with a congressional enactment warrants review by this Court.

### CONCLUSION

For the foregoing reasons and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 7, 1991

## **APPENDIX**



APPENDIX

IN THE SUPREME COURT  
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OCTOBER TERM, 1991

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No. \_\_\_\_\_

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APPLICATION FOR EXTENSION OF  
TIME TO FILE BRIEF IN OPPOSITION  
TO PETITION FOR WRIT OF CERTIORARI

COME NOW the respondents, B. E. Tilley, et al, by counsel, and represent unto this court as follows:

(1) A timely-filed Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit was received by respondents on September 5, 1991.

(2) The issues involved in this Petition are extremely technical in nature and have required respondents to engage the services of attorneys in Indiana and Washington, D.C. to assist in responding to said Petition.

(3) Counsel of record for respondents maintains a general practice in the City of Radford, Virginia. Without the ability to retain specialists in ERISA, respondents would be at a disadvantage and unable to fully respond to said Petition for Writ of Certiorari.

(4) An extension is necessary in order to have time to coordinate the efforts of all attorneys and to give counsel of record time to review, revise and print the material which will be received from retained counsel.

WHEREFORE, respondents, B. E. Tilley, et al, pray that this court grant a thirty (30) day extension of time to reply to the Petition for Writ of Certiorari.

Respectfully submitted,

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